DEPARTMENT OF
COMMUNICATIONS
AND THE ARTS

Our Reference
P97-41

Office of the Secretary
Federal Communications Commission
1919 M Street NW Room 222
Washington DC 20554
United States of America

IB Docket No. 97-142

Dear Sir

NOTICE OF PROPOSED RULEMAKING - RULES AND POLICIES ON FOREIGN PARTICIPATION IN THE US TELECOMMUNICATIONS MARKET

The Government of Australia thanks the United States Federal Communications Commission for the opportunity to comment on its 4 June 1997 Notice of Proposed Rulemaking (NPRM) in the matter of rules and policies on foreign participation in the US telecommunications market.

The Government of Australia welcomes the thrust of the proposal: namely the general removal of the need to undertake an effective competitive opportunities (ECO) analysis before allowing access to the US market. However, the Government of Australia is concerned that the ECO test is effectively retained in some circumstances. It considers that these remaining instances of the ECO test may be incompatible with commitments made in the 15 February 1997 World Trade Organisation agreement on basic telecommunications.

The Government of Australia's comments on the NPRM are attached. These comments are submitted following consultation with Australian telecommunications industry. We understand that some Australian industry participants are also providing comments direct to the FCC on this matter.

Yours faithfully

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Assistant Secretary
Telecommunications Trade and Development Branch

12 August 1997

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FCC NPRM: Rules and policies on foreign participation in the US telecommunications market

1 The Government of Australia thanks the United States Federal Communications Commission for the opportunity to comment on its 4 June 1997 Notice of Proposed Rulemaking (NPRM) in the matter of rules and policies on foreign participation in the US telecommunications market. These comments are submitted following a process of consultation which the Government has conducted with Australian industry. Some industry members are also making comments direct to the FCC on this matter.

2 The Government of Australia welcomes the overall thrust of the proposal, namely the general lifting of the effective competitive opportunities (ECO) analysis test for allowing access to the US market. However, we are concerned that the FCC intends to retain the ECO test in some circumstances. We consider that the ECO test may be incompatible with the commitments made in the 15 February 1997 World Trade Organisation agreement on basic telecommunications and its application by the FCC may undermine global confidence in the implementation of that agreement.

3 We share the FCC's recognition of the potential for misuse of market power by some operators, especially where these are affiliates of overseas carriers based in non-liberalised markets. However, we consider that ex ante hurdles, which predicate denial of market entry on a judged potential for future anti-competitive behaviour, are both unnecessary and undesirable.

4 We consider ex ante hurdles are unnecessary because we have ample experience that, in practice, a credible mechanism of ex post response to misuse of market power is sufficient. As is described in the NPRM itself, a very wide range of ex post regulatory measures is available. Ex post remedies with appropriate penalty powers serve both as an effective deterrent and as a sanction that may be justly applied where abuse of licence occurs.

5 Ex ante hurdles are undesirable on two main grounds. First, they intrinsically weight the decision-making process in favour of incumbents and the status quo - ie they are not pro-competitive. By contrast, facilitation of market entry is a most effective means to achieve the dynamic and competitive market conditions that discourage anti-competitive behaviour. Rather than denying market entry on the possibility that an entrant may engage in anti-competitive behaviour, it is preferable to encourage market entry in order to reduce the opportunities for anti-competitive behaviour.

6 Second, we are of the view that ex ante hurdles are likely to be incompatible with the commitments made in the 15 February 1997 World Trade Organisation agreement on basic telecommunications. We understand those commitments under

the General Agreement on Trade in Services effectively to prohibit measures that deny entry to a market on discriminatory grounds.

7 These general points are illustrated in the following discussion of some particular areas of concern.

8 Australia supports the proposed streamlined processing of applications for section 214 licences by removal of the ECO test (paragraphs 10, 32, 40 and 44-47 of the NPRM). However we are concerned about the qualification in paragraph 40 that an application for a licence under section 214 may be denied on "public interest" grounds "where the carrier would have the ability ... to raise the price of US international service" and the qualification in paragraph 45 that the application may be denied if the licence "would pose a very high risk to competition in the US telecommunications market".

9 We are concerned about the discriminations that would be required in the administration of these proposed rules. The rules would require substantive denial of opportunity to be decided upon a hypothetical view of how a person may behave in future market circumstances, based upon untested factors .

10 Further, the possibility of ex ante access denial creates a direct incentive for anti-competitive behaviour on the part of market incumbents, who are encouraged to pursue every available avenue of process for the benefit of denying, or even simply delaying, entry of a market competitor. For these reasons, ex ante measures are inherently anti-competitive. Ex post measures, such as sanctionable licence conditions on operation, are an appropriate alternative with better effect.

11 Paragraph 47 invites comment on whether the degree of a WTO member's commitment to the agreement on basic telecommunications should be a consideration in granting of a licence. Australia's view is that it should not. For its part, Australia will be allowing market entry to new carriers on equal terms whether from WTO or non WTO member countries and will be using a declared set of ex post measures to address any issues of actual anti-competitive behaviour.

11 Australia supports the proposals (paragraphs 10 and 62) that it is no longer necessary to apply an ECO test for granting cable landing licences for cables between the US and WTO member countries. However, we are concerned about the qualification in paragraph 62 that licences may not be granted if "there is some other compelling public interest reason" for doing so. Australia considers that vague terminology of this nature compromises transparency of process, creates uncertainty and imposes greater risk cost on beneficial market entry. We would also be concerned that the application of this caveat could be inherently subject to scrutiny for consistency with GATS commitments.

12 We are concerned that "trade concerns" (paragraph 74) could be grounds for denial of a licence under section 310. Again, there is ample precedent that the lack of precision and transparency in this terminology would invite abusive resort, on the part of incumbents, to expensive and cumbersome processes that buy delay or denial in the granting of competitive licences.

13 In paragraphs 150 and 151, it is proposed that it no longer be necessary to apply an ECO analysis to determine whether to allow a US carrier to enter into alternative settlement arrangements with carriers from WTO member countries. This is to be replaced with a presumption in favour of permitting such arrangements, although the presumption can be rebutted, for example by demonstrating the country has not opened its market to competition or does not have competitive safeguards.

14 Australia would encourage the FCC to consider the merits of allowing alternative settlement arrangements without qualification. Such arrangements are a powerful force for introducing both vertical and horizontal competition into market. It is well established that the rigidities of current standard settlement arrangements stifle competition. Rather than denying alternative arrangements in the absence of competition, we consider would better achieve its pro-competitive objectives by encouraging deregulation of settlement arrangements in order to further competition. Potential abuses of market power can be addressed effectively by ex post means such as appropriate licence conditions for US operators.

15 It is proposed to prohibit a US facilities-based international private line carrier from originating or terminating US switched traffic over its lines until all US carriers' settlement rates for the country at the foreign end are within the benchmark settlement range to be established in the benchmarks proceeding (paragraphs 38, 50 and 121).

16 We consider this an unnecessary restriction on competition and hold that full competition from private line operators should be encouraged as a way to stimulate diversity of supply and hence overall reduction in settlement rates. The proposal would be counter-productive in that it would constrain such competition until those rates are reduced over what is proposed to be a lengthy transitional period. On a point of detail, we assume that the proposed prohibition would remain until the settlement rates are "within or below" the benchmarks, as rates lower than the benchmarks should be encouraged.

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